SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 154087/2015
POLO ELECTRIC CORP.
vs.
ASPEN AMERICAN INSURAN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 12/4/15
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 8-10
Answering Affidavits — Exhibits _____ **No(s).** 11-16
Replying Affidavits _____ **No(s).** 17

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/9/16

SHIRLEY WERNER KORNREICH **J.S.C.**
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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POLO ELECTRIC CORP. and STATHIS ENTERPRISES, LLC,

Index No.: 154087/2015

DECISION & ORDER

Plaintiffs,

-against-

ASPEN AMERICAN INSURANCE COMPANY,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

The plaintiffs in this action, Polo Electric Corp. and Stathis Enterprises, LLC, seek coverage under an insurance policy issued by defendant Aspen American Insurance Company (Aspen) for damage to property located in New York and New Jersey. The first cause of action in plaintiffs' complaint is for breach of contract. Aspen moves, pursuant to CPLR 3211, to dismiss the second through seventh causes of action and claims for damage to the New Jersey property. At oral argument, the court granted Aspen's motion with respect to the second (bad faith), third (fraud), fourth (negligent misrepresentation), fifth (declaratory judgment), and sixth (specific performance) causes of action and reserved on the seventh cause of action (violation of the National Flood Insurance Act of 1968, 42 USC § 4001 et seq.) (the NFIA) and the claims regarding the New Jersey property. *See* Dkt. 20 (10/1/15 Tr. at 16-18). The balance of the motion is granted in part and denied in part for the reasons that follow.

I. Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint (Dkt. 3) and the documentary evidence submitted by the parties.

Plaintiffs seek coverage for losses Superstorm Sandy caused to property located at 497 Canal Street in Manhattan (the New York Property) and 5 Empire Boulevard in Carlstadt, New

Jersey (the New Jersey Property). The governing insurance policy was issued by Aspen and covers the period between May 1, 2012 and May 1, 2013. *See* Dkt. 13 (the Policy). The Policy's coverage limits and exclusions are not at issue on this motion and, thus, are not discussed. Nor is it disputed that Superstorm Sandy occurred during the policy period.

After Aspen refused to reimburse plaintiffs for the full amounts plaintiffs claimed under the Policy, plaintiffs commenced this action on April 24, 2015 by filing a Summons with Notice (the Summons). *See* Dkt. 1. The Summons only indicates that plaintiffs are asserting claims relating to the New York Property. *See id.* Moreover, the Summons does not include a claim under the NFIA. *See id.*

On May 11, 2015, Aspen filed a Demand for Complaint. *See* Dkt. 2. In response, plaintiffs filed their complaint on May 22, 2015, which, unlike the Summons, contains claims relating to the New Jersey Property and a claim under the NFIA. *See* Dkt. 3. Aspen moved to dismiss on June 11, 2015, and, as noted above, the court ruled on the majority of the motion at oral argument. *See* Dkt. 20. The remaining issues are whether the NFIA applies and whether plaintiffs' omission of the New Jersey Property and the NFIA in the Summons warrants dismissal of such claims.

II. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of

its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Applicability of the NFIA

Congress passed the NFIA in 1968 to incentivize private insurance companies to issue flood insurance policies which, at the time, were not seen as profitable. *See generally Palmieri v Allstate Ins. Co.*, 445 F3d 179, 183-84 (2d Cir 2006). The NFIA led to the creation of the National Flood Insurance Program (NFIP) and associated federal statutes and regulations. *See id.* Aspen claims the Policy is not governed by the NFIA because "it is a standard commercial first-party property policy, not a NFIP policy issued pursuant to the NFIA." *See* Dkt. 9 at 19. Aspen, therefore, contends that plaintiffs have no cause of action under the NFIA. In opposition,

plaintiffs do not address the NFIA or explain why it applies. As a result, plaintiffs have abandoned that claim, which is dismissed.[1]

C. The Sufficiency of the Summons

The parties dispute the sufficiency of the Summons. CPLR 305(b) provides that "[i]f the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and ... the sum of money for which judgment may be taken in case of default." A summons served without a complaint must indicate "at least basic information concerning the nature of plaintiff's claim and the relief sought." *Scaringi v Elizabeth Broome Realty Corp.*, 191 AD2d 223 (1st Dept 1993). However, CPLR 305(c) permits amendment and states "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced". *See Sally v Keyspan Energy Corp.*, 106 AD3d 894, 895-96 (2d Dept 2013). If the summons lacks the requisite detail, the action is "jurisdictionally defective" and, where personal jurisdiction is lacking, could not be amended and must be dismissed. *Roth v State Univ. of N.Y.*, 61 AD3d 476 (1st Dept 2009).

Here, it is undisputed that the Summons provides adequate notice with respect to the New York Property and its attendant breach of contract claim, but not for some of the claims dismissed at oral argument, the NFIA claim dismissed above, or the claims relating to the New Jersey Property. Nonetheless, there is no question that the court has personal jurisdiction over

[1] At oral argument, plaintiffs suggested they need fact discovery to determine whether the NFIA applies. Putting aside the impropriety of making arguments not contained in their brief, plaintiffs do not explain the circumstances under which the NFIA would apply and, therefore, have failed to demonstrate that discovery is warranted. If plaintiffs can proffer a basis to assert a claim under the NFIA and rebut the arguments made in Aspen's briefs, plaintiffs may seek leave to amend.

Aspen and that, regardless of the sufficiency of the Summons with respect to the New Jersey Property claims, this action will proceed. There also is no question that if there are no statute of limitations concerns, even if *both* the Summons and the complaint made no mention of the New Jersey Property, plaintiffs could still seek to assert the New Jersey Property claims by moving for leave to amend their complaint. Such an amendment would almost certainly be granted.[2] *See Thomas Crimmins Contracting Co. v City of New York*, 74 NY2d 166, 170 (1989) (leave to amend pleadings should be freely given); *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012). Moreover, if there is a statute of limitations concern, the relevant inquiry is whether the claims sought to be asserted in the amended complaint may relate back to the original complaint under CPLR 203(f). *See Giambrone v Kings Harbor Multicare Center*, 104 AD3d 546, 548 (1st Dept 2013).[3]

Here, the court is faced with a question of first impression: if an action is commenced by summons with notice, and the summons adequately contains the requisite detail with respect to some claims and a subsequently filed complaint includes additional claims not noticed in the summons, are the claims not set forth in the summons jurisdictionally deficient, regardless if they are sufficiently pleaded in the complaint? This question is complicated by the well settled principle that, unlike a complaint, if a summons is jurisdictionally defective, it may not be amended. *See Micro-Spy, Inc. v Small*, 9 AD3d 122, 126 (2d Dept 2004).

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[2] That Aspen did not move to dismiss the breach of contract claim under CPLR 3211 strongly suggests that, regardless of its merit, it is properly pleaded.

[3] On the instant motion, Aspen does not argue that the New Jersey property claim is barred by the statute of limitations. Both the Summons and the complaint were timely served.

The court has reviewed the cases cited by the parties and conducted its own independent research of New York cases and the CPLR commentary. These sources do not provide a clear answer.[4]

To resolve these questions, the court finds it instructive that a dismissal based on an inadequate summons with notice is a jurisdictional matter – that is, dismissal is mandatory because the court lacks jurisdiction. With respect to this point, there are different types of jurisdiction, such as general and specific, the former giving the court authority over a party, and the latter merely permitting the court to rule on a particular claim involving that party.[5]

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[4] Professor Siegel's commentary documents the lack of doctrinal clarity regarding procedural issues caused by inadequate summons with notice. He candidly remarks that "[c]learly, precedent is of little guidance or comfort to the practitioner." *See* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., CPLR 305, C305:3 (Summons with Notice) (*Siegel*). It also should be noted that the only case to consider a similar issue appears to be *Sultan v Connery*, 2010 WL 10091503 (Sup Ct, NY County 2010), a non-binding decision by another Justice of this court. *Sultan*, however, is distinguishable because the causes of action not contained in the summons (personal injury and nuisance) were distinct from the causes of action listed in the summons (for costs to repair property damage and for loss of use and enjoyment of the premises). *See id.* at *1. The *Sultan* court did not allow the new claims because "[defendant] 'could not reasonably have been expected to ascertain the nature' of the claims from plaintiffs' description in the summons." *Id.* at *1, quoting *Scaring*, 191 AD2d at 223 (an action terminated for failure to obtain personal jurisdiction). Here, in contrast, the breach of contract claim relating to the New Jersey Property is identical to the cause of action asserted with respect to the New York Property. In fact, the claims allegedly arise under the same insurance policy and also arise from the exact same occurrence (Superstorm Sandy). Hence, the *Sultan* court's reasoning is not incompatible with the outcome of the instant decision. That said, it should be noted that *Sultan* does not appear to have been appealed, has not been cited by another court, does not rely on any expressly on-point case, is not cited in Professor Siegel's commentary on CPLR 305, and does not address the considerations discussed herein.

[5] It bears mentioning that the cited, governing precedent regarding CPLR 305 does not precisely identify the meaning of the word "jurisdiction". The Second Circuit recently reiterated that the word "jurisdiction" can refer to a variety of distinct legal concepts. *See Main St. Legal Servs., Inc. v Nat'l Sec. Council*, 811 F3d 542, 566 (2d Cir 2016) ("Although the statute uses the term 'jurisdiction,' the Supreme Court has cautioned that '[j]urisdiction . . . is a word of many, too many, meanings.' Steel Co. v. Citizens for a Better Env't, 523 U.S. at 90 (internal quotation marks omitted). Some statutes use "jurisdiction" to reference subject-matter jurisdiction, that is, a court's 'statutory or constitutional power to adjudicate the case.' Id. at 89. Other statutes,

Obviously, without jurisdiction over a party, no lawsuit can validly proceed. However, it is commonly the case that during the pendency of an action where the court has jurisdiction over a party in regard to certain claims, a party may seek leave to expand the scope of the court's specific jurisdiction to amend to add additional claims. Absent prejudice, as noted above, the court has discretion pursuant to CPLR 305(c) to permit amendment. The standards for leave to amend are well settled. Leave should be granted when the proposed claim is not clearly devoid of merit and there is no prejudice to the defendant. *See Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015).

With these principles in mind, the answer to the relevant question becomes apparent. As noted, the court has jurisdiction over Aspen and specific jurisdiction with respect to the New York Property claims. If plaintiffs' complaint, like the Summons, did not mention the New Jersey Property claims, plaintiffs could, prior to the answer, as of right, amend to assert the New Jersey claims. If, then, Aspen contended that the New Jersey Property claims are time barred, the decision on whether to permit the amendment would turn on the applicability of the relation back doctrine. The relevant inquiry under CPLR 203(f) would be whether the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Here, specifically, the question would be whether pleaded claims for losses arising from a specific set of events gives fair notice to the insurer of the factual predicate for additional losses caused by the same underlying event when such losses are governed by the same insurance policy. That standard is clearly met in this case because the

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however, use 'jurisdiction' to 'specify[] the remedial powers of the court.' Id. at 90 (emphasis omitted). The latter use does not implicate subject-matter jurisdiction. See id."). As discussed herein, the typical defect of a summons with notice is its failure to confer jurisdiction over the defendant; here, that is not the case. Hence, as the court explains, the defect in the Summons is not "jurisdictional" in the traditional sense under CPLR 305, and thus the defect is correctable by amendment.

complaint addresses the New Jersey Property claims. Hence, if there was no issue with the Summons, leave to amend would be granted because the relation back doctrine would apply. Dismissal for inadequacy of the Summons is incongruous. Jurisdiction over Aspen exists; the insurance policy covering both the New York and New Jersey properties was noticed by the Summons as was Superstorm Sandy, the occurrence from which the damages allegedly arose; and the complaint, which was timely filed, made mention of the New Jersey property.

Moreover, a dismissal for failure to serve a sufficiently detailed summons would have no preclusive effect. *See Siegel* at C305:3 ("dismissal for noncompliance with CPLR 305(b) is not res judicata"). And, while such a dismissal would not afford a plaintiff the benefit of "the six-month savings provision of CPLR 205(a)", which "cannot be used to resurrect the action" if the case would become time-barred [*see id.*], here, the running of the statute of limitations is of no import due to the applicability of the relation back doctrine. As a result, even if dismissal of the New Jersey Property claims was warranted at this juncture, dismissal would have no bearing on plaintiffs' ultimate ability to prosecute that claim in this action.

In other words, Aspen's substantial rights are not implicated because the court's jurisdiction over Aspen is not uncertain. The only question is whether the court currently has specific jurisdiction over the New Jersey Property claims or if such specific jurisdiction will be acquired at a later date. No settled law or sensible public policy is served by requiring the parties and the court to expend further resources on this issue.

To the extent the Summons needs to amended – a holding this court does not make and finds to be doubtful – the court, out of an abundance of caution, grants plaintiffs leave to amend

the Summons to add the New Jersey Property breach of contract claim.[6] CPLR 305(c) expressly permits amendment of "any" summons, which, by definition, must include a summons with notice. And while a jurisdictionally defective summons is a nullity and cannot be amended [*see Heath v Normile*, 131 AD3d 754, 755 (1st Dept 2015) (completely "bare" summons does not confer jurisdiction)], here, the Summons validly conferred jurisdiction over Aspen. *Cf. Gerschel v Christensen*, 128 AD3d 455, 457 (1st Dept 2015) (summons a nullity where jurisdiction not acquired **over defendant**).

In sum, unlike a bare Summons that is jurisdictionally defective as to the defendant, here, the Summons validly conferred jurisdiction over Aspen. Ergo, to the extent the New Jersey Property claims are not before the court, such a lack of specific jurisdiction could be addressed on a motion to amend. In this instance, the relation back doctrine would save the subject claims from being time barred. For this reason, rather than waste the parties' time and money with further motion practice, the court permits amendment of the Summons to definitively resolve any specific jurisdiction concerns. Amendment of the Summons is proper in the court's discretion because Aspen's substantial rights are not prejudiced. Accordingly, it is

ORDERED that the balance of the motion to dismiss by defendant Aspen American Insurance Company not decided on the October 1, 2015 record is granted only with respect to the seventh cause of action (the NFIA claim), which is dismissed, and is otherwise denied; and it is further

ORDERED that within 21 days of the entry of this order on the NYSCEF system, plaintiffs Polo Electric Corp. and Stathis Enterprises, LLC may serve defendants with an

[6] To be clear, plaintiffs *do not* have leave to reassert the claims dismissed at oral argument related to the New Jersey Property, but plaintiffs may replead the NFIA claim if, as previously discussed, they can demonstrate the NFIA's applicability.

amended summons to include a breach of contract claim regarding the New Jersey Property, and such service shall be deemed, *nunc pro tunc*, to be effective as of April 23, 2015; and it is further

ORDERED that plaintiffs may also amend their complaint within 21 days of the entry of this order on the NYSCEF system to replead a claim under the NFIA if plaintiffs can demonstrate the NFIA's applicability.

Dated: March 9, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.